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No. 80-253

In the Supreme Court of the United States

October Term, 1980

EARLE YANOWITZ,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
JOHN T. DOHENY
Counsel of Record
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 623-7857
Attorneys for Respondent

BERNARD J. STUPLINSKI
MICHAEL H. DIAMANT
KAHN, KLEINMAN, YANOWITZ & ARNSON CO., L.P.A.
1300 Bond Court Building
Cleveland, Ohio 44114
(216) 696-3311
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Ohio, Eighth Appellate District, and in the Supreme Court of Ohio. The Court of Appeals affirmed the petitioner's conviction, but modified it in a non-relevant aspect. The Supreme Court of Ohio disallowed the motion for leave to appeal, and thereby affirmed the conviction.

The three Ohio Courts involved in this case have decided it in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal questions are presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. The trial court did not act contrary to the Fourth Amendment of the United States Constitution, when it denied the motion to suppress evidence seized in the search of petitioner's home, pursuant to a lawful search warrant.

2. This Court has adequately delineated the principles to be applied by courts when assessing the timeliness of information provided by an informant, to establish the requisite probable cause necessary for issuance of search warrant.

3. The decision of the Ohio Supreme Court and the lower state courts herein are fully consistent with this Court's decisions in *Aguilar v. Texas* (1964), 378 U.S. 108 and *Spinelli v. United States* (1969), 383 U.S. 410.

STATEMENT OF THE CASE

On October 6, 1977, an officer of the Cleveland Police Department Narcotics Unit received an anonymous telephone call, as a result of which he and other Cleveland Police Officers proceeded to Room 207 of the Marriott Inn located in Cleveland, Ohio. They knocked and were admitted by a male not known by them who consented to a search of the room (R. 157, 158, 180, 195). Later that evening, Officer John Hoyt of the Lakewood Police De-

partment Narcotics Unit prepared an affidavit (R. 8 - Suppression Hearing, R. 197) which contained the following information given to him by the Cleveland Police Officers as to what transpired in Room 207 after they searched the room:

"During the course of a narcotics investigation, Detective Hoyt learned the following information from Detective Richard Rutt, a member of the Cleveland Police Narcotic Unit. That Detective Rutt on October 6, 1977 has arrested a male for possession of cocaine during the course of the arrest and investigation of the male arrested Detective Rutt learned that the cocaine that the male had that was arrested was to be delivered to 12590 Lake Road to a Earl Yanowitz. A telephone conversation between the arrested male and a male identifying himself as Earl Yanowitz was overheard by Detective Rutt and Yanowitz stated he wanted the arrested male to bring the cocaine over to his house, and that he had customers coming at 9:00 PM tonight. He stated his address was 12590 Lake Avenue, and this was also overheard by Detective Rutt. The arrested male stated that he had been over to the house on Lake Avenue on numerous occasions, and that Yanowitz has always had marijuana in plain view in the house. He also stated that Yanowitz used cocaine and that he would have his own personal supply in the house, and that would be in addition to the 2 ounces of cocaine that he was to purchase. During the arrest of the male with 2 ounces of cocaine a notebook was found belonging to the male and in the notebook was the name Earl Yanowitz with a phone number 228-3930. Detective Neelon had arrested male call this number and a male named Earl told the arrested male to get over there right away because he had customers waiting, and he already lost 400 dollars.

> Detective Neelon overheard the conversation. Predicated on the foregoing affiant avers that it is urgently necessary that the above described premises be searched in the night season forthwith to prevent the above named property from being concealed or removed so as not to be found."

Officer Hoyt also prepared the search warrant for a night search of the premises located at 12590 Lake Avenue, Lakewood, Ohio (R. 6 - Suppression Hearing, R. 197). The affidavit and the search warrant were taken to the home of Lakewood, Ohio Municipal Judge Harold J. Craig, where Officer Hoyt swore to and signed the affidavit in the presence of Judge Craig. Judge Craig signed the search warrant based upon the statements contained in the aforesaid affidavit (R. 5-9 - Suppression Hearing, R. 25).

Immediately thereafter, officers of the Lakewood and Cleveland Police Departments proceeded to 12590 Lake Avenue, Lakewood, Ohio.

Upon entering the premises, they commenced to search the house and found various bags and vials containing marijuana, cocaine and LSD. Petitioner Yanowitz was in his bedroom on the second floor when the officers entered the house. Much of the contraband was found in that room (R. 29, 36).

Prior to the search and arrest of Petitioner Yanowitz, he was not known to the officers of the Lakewood or Cleveland Police Narcotics Units (R. 29, 86, 108, 161, 186-188, 207).

On October 27, 1977, Earle Yanowitz, was indicted by the Grand Jury of Cuyahoga County for violations of Sections 2925.03 and 2925.11 of the Ohio Revised Code (i.e. possession of cocaine in an amount equal to or exceeding bulk but less than three times bulk; possession of mari-

juana in an amount equal to or exceeding three times the bulk and possession of LSD less than bulk amount). At his arraignment on the indictment, Petitioner entered pleas of not guilty to each of the counts contained in the indictment.

On February 14, 1978, Petitioner filed his motion to suppress evidence.

On June 16, 1978, hearing was had on the motion to suppress evidence before the Honorable Perry B. Jackson, Judge of the Court of Common Pleas, Cuyahoga County, Ohio. After hearing the testimony of witnesses and arguments of counsel, Judge Jackson denied the motion to suppress.

On July 14, 1978, trial was had before a jury in the courtroom of the Honorable Roland Riggs, Judge of the Court of Common Pleas, sitting by assignment. On July 18, 1978, the jury returned a verdict of guilty on each count of the indictment, and the petitioner was forthwith sentenced.

From that verdict and judgment, petitioner appealed to the Court of Appeals of Ohio, Eighth District, Cuyahoga County. On March 3, 1980, the Court of Appeals affirmed the judgment of the Court of Common Pleas as to counts one and three of the indictment upholding the validity of the search warrant. The court reversed the conviction on count two of the indictment on issues which are not relevant before this Court and remanded for resentencing.

From the decision of the Court of Appeals of Ohio, the Petitioner filed a motion for leave to appeal in the Ohio Supreme Court. On June 6, 1980, that Court overruled the motion for leave to appeal and dismissed the Petitioner's appeal for the reason that "no substantial constitutional question exists". On June 27, 1980, the Supreme Court of Ohio denied Petitioner's motion for rehearing.

REASONS FOR DENYING THE WRIT

1. The trial court did not act contrary to the Fourth Amendment of the United States Constitution, when it denied the motion to suppress evidence seized in the search of Petitioner's home, pursuant to a lawful search warrant.

2. This Court has adequately delineated the principles to be applied by courts when assessing the timeliness of information provided by an informant, to establish the requisite probable cause necessary for issuance of search warrant.

3. The decision of the Ohio Supreme Court and the lower state courts herein are fully consistent with this Court's decision in *Aguilar v. Texas* (1964), 378 U.S. 108 and *Spinelli v. United States* (1969), 383 U.S. 410.

Petitioner's brief indicated that the affidavit was based on hearsay declarations of an unidentified informant. That is not entirely true since a portion of the facts enunciated in the affidavit was based on the direct observations of Detective Rutt and/or Detective Neelon (i.e., the cocaine in the possession of the informant, the address book in the possession of the informant and the telephone conversations between the informant and the appellant). Beyond that, an affidavit is not defective simply because it is based on hearsay declarations of an unidentified informant. "Double hearsay" is even permissible. *Rugendorf v. United States* (1964), 376 U.S. 528.

Nor does the affidavit have to allege that the informant was known to the police or had previously supplied reliable information. The Ohio Supreme Court, in *State v. Karr* (1975), 44 Ohio St. 2d 163 and in *State v. Haynes* (1971), 25 Ohio St. 2d 264, quoted with approval the fol-

lowing language from this Court in *Jones v. United States,* (1960), 362 U.S. 257:

> "Although the fact that an informant has previously supplied reliable information carried some weight, the determination of reliability or credibility cannot be based solely upon that fact. To do so, would necessarily do away with informants, since no one could ever qualify as a reliable informant the first time."

The United States Supreme Court in *United States v. Harris* (1971), 403 U.S. 573, specifically indicates that an averment of previous reliability of the informant is not necessary for a finding of probable cause.

What is necessary is that the affidavit recite some underlying facts and circumstances from which the magistrate could determine (1) that the informant was credible or his information reliable and (2) that there were narcotics at the home of the petitioner. *Aguilar v. Texas* (1964), 378 U.S. 108, and *Spinelli v. United States* (1969), 383 U.S. 410.

The following facts and circumstances support the reliability of the informant and his information:

First, according to the affidavit, the informant was arrested with two ounces of cocaine in his possession. This supports the proposition that the informant would know people involved with drugs and also supports his statement that he was to make a delivery of cocaine to the petitioner on the night in question.

Second, according to the affidavit, the informant was arrested with a notebook in his possession which contained the name and phone number of the petitioner. This supports the proposition that the informant knew the petitioner and where the petitioner lived.

Third, according to the affidavit, the informant, upon arrest, admitted that he was to deliver two ounces of cocaine to the petitioner. Clearly this amounted to an admission of criminal intent which went beyond mere possession of a controlled substance. The admission ran to the sale of cocaine. Such admissions against interest "carry their own indicia of credibility—sufficient at least to support of finding of probable cause to search" according to at least four of this Court's Justices in *United States v. Harris, supra,* at 583.

Fourth, according to the affidavit, a telephone conversation was overheard by Detective Rutt between the informant and an individual who identified himself as the petitioner wherein the petitioner told the informant to bring the cocaine to his home at 12590 Lake Avenue because customers were coming.

Fifth, according to the affidavit, after the notebook had been found, Detective Neelon told the informant to call the number listed to the petitioner in the notebook. The informant had a conversation with a party named Earle wherein the petitioner told the informant to get over right away because customers were waiting. Detective Neelon overheard this conversation.

These conversations support the following propositions:

(1) That the informant's notebook was accurate,

(2) That the informant did know the petitioner,

(3) That the informant did know where the petitioner lived and was to make a cocaine delivery there,

(4) That the informant had been in recent contact with the petitioner to set up the cocaine exchange,

(5) That the petitioner was currently involved with drugs.

It is clear that the affidavit provides more than sufficient information for the magistrate to determine with probable cause that the informant and the informant's information were reliable.

The following facts and circumstances support the proposition that there was probable cause to believe that there would be narcotics at the petitioner's home on the night in question.

First, according to the affidavit, the informant had *personally* been to the petitioner's home on *numerous* occasions. As a result, the fact that there is probable cause to believe a crime was being committed on the night in question (i.e., possession of various controlled substances) is based not on mere rumor or speculation but on the personal observations of the informant.

Second, according to the affidavit, the petitioner *always* had marijuana in plain view in the house. Although this was stated in the past tense, it clearly shows a continuing pattern of behavior over numerous occasions with marijuana always present.

Third, according to the affidavit, the petitioner used cocaine and "he would have his own personal supply . . . in addition to the two ounces of cocaine he was to purchase". This is stated in the present tense and the information was received from the informant on the same day the affidavit was filed with the magistrate.

Fourth, according to the affidavit, there were two telephone conversations between the informant and the petitioner on the day in question which indicate that the informant and the petitioner were maintaining an active relationship at that very time and that the petitioner was at that very time still involved with drugs.

Regarding the timeliness of information, various federal circuit courts have held that there is no arbitrary

time limit on how old information contained in an affidavit may be, so long as there are sufficient facts to justify a conclusion that the subject contraband is probably on the person or premises to be searched at the time the warrant is issued. See *United States v. Johnson* (10th Cir. 1972), 461 F.2d 285; *Durham v. Johnson* (9th Cir. 1968), 403 F.2d 190; *United States v. Guinn* (5th Cir. 1972), 454 F.2d 29; *Schoeneman v. United States* (D.C. Cir. 1963), 317 F.2d 173. This Court should continue this case-by-case analysis of the timeliness question. There is no need for further delineation than has already been made.

In the case at bar, the affidavit disclosed that the informant had "always" observed marijuana in petitioner's premises during his "numerous" visits. This information clearly suggests a continuing pattern of behavior. That petitioner was continuing this pattern of behavior at the time the warrant was issued was reinforced in the affidavit by the two telephone conversations which occurred on the date the warrant was issued between the informant and petitioner. These conversations disclosed that petitioner was engaged in a continuing course of conduct which involved the possession of illegal drugs. As the Tenth Circuit Court of Appeals pertinently stated:

> "Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, *where the affidavit properly recites facts indicating activity of a protracted and, continuous nature, a course of conduct, the passage of time becomes less significant.*" (Emphasis added).

United States v. Johnson, supra, at 287.

These facts and circumstances indicate that there was probable cause to believe controlled substances would be

present at the petitioner's home and that the information was not stale.

This Court has already given guidelines for the review of affidavits such as the one in question:

> "The Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by the non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this arena. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting this evidence to a judicial officer before acting. *United States v. Ventresca* (1965), 380 U.S. 102 at 108 (This language is also cited with approval in *United States v. Harris, supra*)."

The Ohio Supreme Court in *State v. Haynes* (1971), 25 Ohio St. 2d 264 at 268 and 269, following this Court's lead in *Jones v. United States, supra,* enunciated the following guidelines:

> "In determining the reliability of the information, the magistrate must consider the facts presented to him, and if such facts would cause a reasonable man to believe there are grounds for believing that the contraband is on the premises sought to be searched, he is justified in believing in the reliability of the informant. It must be remembered that the probable cause necessary to justify the issuance of a search warrant requires less facts than are necessary for

conviction, and the amount and method of proof is less strict. *Jones v. United States* (1960), 362 U.S. 257.

In this type of case, the court is concerned with probable cause, not certainty, and this extends to the determination of the reliability of the informer. It is not necessary to show uncontrovertible proof that the informer is reliable, but only that such information would cause a neutral and detached officer to believe there is sufficient substance to the statement to justify a search of the premises."

Since the affidavit in question does meet the two-pronged test enunciated by this Court in *Aguilar* and *Spinelli,* and since the affidavit does show timely information, there has been no violation of the petitioner's constitutional rights.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any questions of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By: JOHN T. DOHENY
Counsel of Record
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Attorneys for Respondent